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# Supreme Court of the United States

**OCTOBER TERM, 1963**

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**No. 768**

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**LONNIE H. STONE,**

**Petitioner,**

**versus.**

**UNITED STATES OF AMERICA**

**Respondent.**

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.**

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S. GUNTER TONEY
212 East Jefferson Street
Tallahassee, Florida.
Attorney for Petitioner.

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UNITED STATES SUPREME COURT

OCTOBER TERM, 1963

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No.

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LONNIE H. STONE,

Petitioner,

versus

UNITED STATES OF AMERICA

Respondent.

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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Petitioner, Lonnie H. Stone, by his attorney, S. Gunter Toney, presents this, his Petition for Writ of Certiorari:

## REPORT OF OPINIONS BELOW.

The District Court entered judgment and imposed sentence but did not deliver an opinion.

The opinion of the United States Court of Appeals for the Fifth Circuit has not yet been published in any official or unofficial report. That opinion is included in the certified transcript of the record filed herewith (R. 110).

## STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

Petitioner seeks to have reviewed a Judgment of the United States Court of Appeals, Fifth Circuit, dated the 13th. day of November, 1963, affirming the Judgment and Sentente of the United States District Court for the Northern District of Florida, Marianna Division, on appeal included in the certified transcript of the record filed herewith (R. 119).

The Petitioner filed a Petition for Rehearing with the United States Court of Appeals, Fifth Circuit, on the 3rd. day of December 1963 (R. 120).

The statutory provision conferring on this Honorable Court jurisdiction to review the judgment of the United States Court of Appeals, Fifth Circuit, is 62 Statutes 928. (June 25, 1948, Chapter 646).

## QUESTION PRESENTED FOR REVIEW.

The point relied on by the Petitioner for granting of the Writ of Certiorari, is as follows:

**The Trial Court's blanket order prohibiting publication of the names of petit jurors until the morning of the opening day of the term, its refusal to allow petitioner to inspect the summons issued to the Marshal on file in the office of the Clerk, a public document, its denial of petitioner's motion for a single days postponement for the purpose of checking the juror's qualifications were severally and**

**collectively discriminatory and denial of due process of law in violation of petitioner's rights under the Fifth Amendment of The Constitution of The United States.**

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED.

### AMENDMENT V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property; without due process of law; nor shall private property be taken for public use, without just compensation."

### STATUTES AND RULES INVOLVED.

1. 18 U. S. C. A. Sec. 3432 provides:

"A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each venireman and witness."

2. 28 U. S. C. A. Sec. 1864 provides in pertinent part:

"The names of grand and petit jurors shall be publicly drawn from a box containing the names of not less than three hundred qualified persons at the time of each drawing . . ."

3. 28 U. S. C. A. Sec. 1867 provides in pertinent part:

"When the court orders a grand or petit jury to be drawn the clerk shall issue summons for the required number of jurors and deliver them to the marshal for service . . ."

". . . Such service shall be made by the marshal who shall attach to his return the addressee's receipt for the registered summons, where service is made by mail."

4. Rule 24 (b) of the Federal Rules of Criminal Procedure provides in pertinent part:

"(b) Peremptory Challenges . . . If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges . . ."

## STATEMENT OF THE CASE.

The petitioner was indicted on January 30, 1961 at Tallahassee, Florida, and charged in a three count indictment. Count One charged unlawful possession of a still or distilling apparatus. Count Two charged that he did unlawfully make or ferment mash fit for distillation or for the production of distilled spirits. Count Three charged possession of non-tax paid distilled spirits, (R. 3-4).

On November 29, 1962, four days prior to the commencement of the second trial of the cause, petitioner filed his Motion For Leave to Inspect the List of Petit Jurors in the office of the Clerk of the Court and in the alternative sought postponement of his trial to a date subsequent to the opening day of the term or a date subsequent to December 3, 1962

(R. 18-19). The basis for this Motion was the refusal of the Clerk to allow inspection of the Jury List and the Court's blanket order prohibiting publication of the Jury List until the morning of the opening day of the term, (R. 19). The Court denied said Motion (R. 20).

On December 3, 1962, the opening day of the term, petitioner's case was called for trial at which time his counsel announced that he was not ready for trial for the same reasons set forth in his motion to inspect the Jury List. (R. 37). Thereafter, at a bench conference, out of the presence of the jury, counsel for petitioner announced for the record that he had received a copy of the Jury List at 8:25 A.M. on the day that the case was called for trial. The Court reprimanded counsel for protecting the record and threatened him with contempt of Court (R. 79).

## ARGUMENT.

**The Trial Court's blanket order prohibiting publication of the names of petit jurors until the morning of the opening day of the Term, its refusal to allow petitioner to inspect the summons issued to the Marshal on file in the office of the Clerk, a public document, its denial of petitioner's motion for a single days postponement for the purpose of checking the jurors' qualifications were severally and collectively discriminatory and denial of due process of law in violation of petitioner's rights under the Fifth Amendment to The Constitution of The United States.**

Seven days prior to trial petitioner made a request of the Deputy Clerk, Marianna Division of the lower court, to inspect the list of Petit Jurors summoned for the term of Court commencing on December 3, 1962. Petitioner was advised by the Deputy Clerk that the Jury had been drawn and

summoned, but refused to allow the requested inspection. The Deputy Clerk further advised petitioner that the Court had issued a blanket order prohibiting publication of the Jury List until the morning of the opening day of the term, that is, Monday, December 3, 1962 (R. 18-19).

On Thursday, November 29, 1962, Petitioner filed his Motion For Leave to Inspect the Marshal's Return of Service of the jurors in the Office of the Clerk of the trial court and in the alternative sought a postponement of trial for at least one day subsequent to the opening day of the term (R 18-19). The Court denied each aspect of this Motion and referred to its Directive of December 4, 1961 and its Order of November 29, 1962 (the date of the Order Denying this Motion) formally adopting the practice of prohibiting publication of the Jury List (R. 20).

On December 3, 1962, the opening day of the term, at 8:25 A.M. petitioner received a copy of the list of jurors (R. 79). Shortly thereafter petitioner's case was called for trial (the first case of the day) at which time petitioner announced that he was not ready for trial for the same reasons set forth in his Motion to Inspect the List of Jurors (R. 37).

Title 28 U.S.C.A., Sec. 1864, requires that the names of Grand and Petit Jurors shall be *publicly drawn* from a box containing the names of not less than three hundred qualified persons at the time of each drawing.

Title 18 U.S.C.A., Sec. 1867, requires the United States District Clerk to issue summons for the required number of jurors and deliver same to the Marshal for service. The United States Marshal is required to file his return of the jurors served in the Clerk's Office.

It is submitted that the trial judge abused his discretion in issuing blanket orders prohibiting petitioner and other members of the public from viewing a public record in the files of a governmental agency. Petitioner contends that Congress did not intend that the jury summons and Marshal's return be stamped "top secret" or "confidential". Title 28 U.S.C.A., Sec. 1864 requires that the names of grand jurors and petit jurors shall be *publicly drawn*.

An accused tried on the second, third or subsequent day of the term in the Northern District of Florida has access to the jury list from the first day of the term. It is only the defendant who must face the jury within one to two hours after receiving the list of jurors on the first day of the term that is placed at a disadvantage. Clearly, the blanket order in this case, is discriminatory. It is readily apparent that the blanket order, the trial court's denial of defendant's right to inspect the summons and return prior to trial and the Defendant's Motion for a single day postponement severally and collectively constituted an abuse of discretion.

No worthwhile purpose may be served in clamping the lid of secrecy on the jurors publicly drawn from the box in accordance with Title 28 U.S.C.A., Sec. 1864. Anyone may attend this drawing and copy the names of those drawn. That the Statute requires that the jurors be publicly drawn is not open to doubt, *Wilson v. United States*, 5th. Cir. 104 F. 2d 81; *Hammerschmidt v. United States*. 287 Fed. 817; *United States v. Standard Oil Co.*, D.C. Ind., 165 F. Supp. 359.

The great benefit to a defendant in civil and criminal cases of conducting a pre-trial investigation of the prospective jurors is recognized by all practicing lawyers. In important cases credit reports on each prospective juror are often obtained. Information such as religion, nationality, place of

birth, and criminal records, which is of a delicate nature and a source of embarrassment to the jurors if sought on voir dire, are extremely helpful in determining the desirability of jurors. This information is of inestimable value in exercising the right to challenge either for cause or peremptorily.

Title 18 U.S.C. Sec. 3432 requires:

> "A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with a copy of the indictment and a list of the veniremen . . ."

This Statute has been construed to not entitle the Clerk of the Court to fees for furnishing copies of Jury Lists in cases where the Defendant was charged an offense less than capital. This Court held in the case of *United States v. Van Duzee*, 140 U. S. 169, 11 S. Ct. 758 that in cases, not capital, the prisoner is not entitled to a list of witnesses and jurors at government expense. Lower federal courts have applied this construction of the statute. *United States v. Wood*, 28 Fed. Cases 754, 755. *Shelp v. United States*, 9th. Cir., 81 Fed. 694.

In the case of *Wilson v. United States*, 5th. Cir., 104 F. 2d 81 the Court held that the Defendant charged with a non-capital offense was not, as a matter of right, entitled to receive the list of jurors prior to the day of trial and further held that the time at which defendants may be given a jury list is left to the sound discretion of the trial court citing *United States v. Van Duzee, supra.* In the *Wilson* case the Court approved of the trial court passing the case over one day to permit counsel to check the qualification of the jurors.

In the case at bar, petitioner avoided asking for a list of the jurors to be furnished at government expense. He sought to inspect a public record (Marshal's return and summons) in the Office of the Clerk of the Court.

No case has been discovered where this Court has ruled upon the question of the rights of an accused to view the public record containing the names of petit jurors, publicly drawn, in advance of trial. This Court in the case of *United States v. Van Duzee*, 140 U.S. 169, 11 S. Ct. 758, a case where a district clerk sought fees for furnishing a list of witnesses and jurors to an accused charged with an offense less than treason or other capital offense, held that the prisoner was not entitled to a list of witnesses and jurors at government expense.

The lower appellate courts have cited the Duzee case as authority for holdings that defendants charged with non-capital offenses were not, as a matter of right, entitled to *receive the list of jurors* prior to the day of trial. *Wilson v. United States*, 5th Cir. 1939, 104 F. 2d 81, cert. den. 308 U.S. 574, 60 S. Ct. 89; *Spivey v. United States*, 5th Cir. 1940, 109 F. 2d 181, cert. den. 310 U.S. 631, 60 S. Ct. 1079; *Hamer v. United States*, 9th Cir. 1958, 259 F. 2d 274, 279, cert. den. 359 U.S. 916, 79 S. Ct. 592; *Wagner v. United States*, 9th Cir. 1959, 264 F. 2d 524.

It is submitted that the Duzee case and the lower court cases cited hereinabove are all distinguishable on the facts from the case at bar. Here petitioner sought to view a public record in the office of the district court clerk; he did not seek a list of jurors at government expense.

The letter directive or blanket order of the trial judge, prohibiting disclosure or publication of the names of jurors

drawn for service, was apparently designed to avoid possible violation of obstruction of justice statutes and abuse of prospective jurors (R. 111).

It is submitted that the blanket order is a reflection upon the jury commissioners and the jurors. The implication is clear that the commissioners may possibly select jurors who would be susceptible to pressure and that the jurors would not report attempts of corruption to the trial court.

The appropriate remedy and deterrent to jury tampering is the existence of and prosecution under the obstruction of justice statutes.

The trial court's attempt to remedy a possible wrong—jury tampering—by stamping as top secret a public record which is designed for the protection of all citizens including the accused, constituted a denial of due process of law in violation of petitioner's rights under the Fifth Amendment to the Constitution of the United States.

## PRAYER.

WHEREFORE, Petitioner prays that he may be granted a Writ of Certiorari and that this Honorable Court consider the certified Transcript of Record filed herewith and on hearing, the Judgment of the United States Court of Appeal, Fifth Circuit, affirming the Judgment and Sentence of the District Court of Florida, be quashed, and Petitioner further prays for such other and further general relief as may be meet and proper.

Respectfully submitted,

S. GUNTER TONEY
212 East Jefferson Street
Tallahassee, Florida
Attorney for Petitioner.

## CERTIFICATE OF SERVICE.

I hereby certify that I served a copy of the foregoing petition for Writ of Certiorari, by mail, to the Honorable Clinton N. Ashmore, United States Attorney, Tallahassee, Florida, and a copy to Solicitor General, Department of Justice, Washington 25, D. C. on this 15th day of January, 1964.

S. GUNTER TONEY

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JAN 15 1964
JOHN F. DAVIS, CLERK

# Supreme Court of the United States

**OCTOBER TERM, 1963.**

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## No. 768

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**LONNIE H. STONE,**
**Petitioner,**

**versus**

**UNITED STATES OF AMERICA,**
**Respondent.**

---

**APPENDIX TO PETITION FOR WRIT OF CERTIORARI.**

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Attorney for Petitioner.

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**CORRECTED.**

**IN THE**
**UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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**No. 20270**

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**LONNIE H. STONE,**

**Appellant,**

**versus**

**UNITED STATES OF AMERICA,**

**Appellee.**

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**Appeal from the United States District Court for the Northern District of Florida.**

---

(November 13, 1963.)

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Before RIVES and JONES, Circuit Judges, and DAWKINS, JR., District Judge.

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JONES, Circuit Judge: The appellant asserts that his conviction of moonshine activity was erroneous and should be reversed.

The judge of the District Court for the Northern District of Florida, on December 4, 1961, sent out an instrument which the United States Attorney calls a Letter Directive and which counsel for the appellant calls a blanket order. It was directed to the U. S. Marshal, Clerk, Deputy Clerks, and Jury Commissioners. It was in these terms:

> "Effective this date the names of jurors drawn for service on the grand jury or the petit jury in this District, or any division thereof, shall not be disclosed or published to any persons whatsoever in the absence of further order of this Court until the day of the beginning of service of such jurors for the term for which they have been subpoenaed.
>
> "This procedure has been followed for a long time in many other Districts. While I am confident that our old system has not been abused to any great extent, we have, nevertheless, had enough occasions where it was to suggest the need of such a restriction as this. Indeed, I am inclined to believe that this will eliminate the possibility of many situations which, if not actual violations of the obstruction of justice statutes, give rise to possible suspicion and subject prospective jurors to annoyance if not pressure."

The appellant's case was set for trial on December 3, 1962, the opening day of a trial term of the Marianna, Florida, division of the court. On November 29, 1962,

the appellant filed a motion for leave to inspect the list of jurors and, in the alternative, for a continuance to a date later than the opening day of the term. On December 3, 1962, the appellant stated that he was not ready for trial for the reason asserted in his prior motion and sought a continuance. The court overruled the appellant's objection and the case proceeded to trial.

During the voir dire examination of the prospective jurors, the record shows the following:

Defense Counsel:

"Gentlemen [of the jury] I direct this question to all of you, if at the close of this case the evidence appears to be well balanced, or even, would you tend to favor one side or the other?"

The Court:

"Mr. Toney, I think that is a little confusing. I will say if we are going to ask questions that call for legal conclusions you had better direct your question to the Court first."

"All right, sir. The question is, if any of the jurors—

The Court:

"I heard the question."

Defense Counsel:

"Will you permit the question?"

The Court:

"No. Not in the form stated.

Defense Counsel:

"Members of the Jury, if at the end of the case and the evidence is fairly equally balanced—I direct this question to the Court first—and the Court instructs you that if you find that the government has failed to meet this test; that is the burden of proof beyond a doubt, would you follow the Court's instruction and acquit the defendant?"

U. S. Attorney:

"May it please the Court, I think he should use the words 'reasonable doubt'."

The Court:

"Let me say this, gentlemen, that is the difficulty in asking legal questions on voir dire examination, it calls for the Court to have to step in and Charge the jury when we haven't even got a jury. Let me ask the jury this, you have already been asked this once, if you are accepted as a juror in this case, will you take the law as it is my duty to give it to you, will you accept the law as I give it to you and accept the fact, whether it is right or wrong, it is my duty to tell you what the law is and it is your duty to accept it as a juror in this case, to accept that law, will you do so, whatever it may be whether it is about the standards of proof or anything else. . . . I think that covers everything."

Defense Counsel:

"Your Honor, may I specifically specify the reasonable doubt rule and the offer of circumstantial evidence rule in this type of question?"

The Court:

"Is it applicable? I am not sure that it is applicable at this point. You may ask, so will you accept this Charge of the Court as to the standards that require the government to prove its case beyond a reasonable doubt and as to how you shall apply certain standards of evidence if that is applicable? Will you do so?"

Jurors:

Nodded affirmatively.

The Court:

"There is your answer."

Defense Counsel:

"May I ask the Jury if they find the case is built on circumstantial evidence—"

The Court:

"I have already asked them if it is applicable will they follow the instruction. That is all that need be said on the subject."

Defense Counsel:

"Gentlemen, have any of you read anything about this case in the newspaper? I believe one

gentleman mentioned that he had heard some comment."

Juror:

"I have heard it mentioned."

Defense Counsel:

"I believe that you have answered that that comment would not affect your verdict one way or the other and that you would base your verdict on the evidence from the witness stand?".

Juror:

"Yes, sir."

Defense Counsel:

"Gentlemen, the fact that this is a moonshine whiskey case, as the U. S. Attorney has stated to you, would this fact embarrass you or prejudice you in any way against the defendant in trying this type of case?"

Jurors:

Nodded, no.

Defense Counsel:

"Are any of you ex-law enforcement officers?"

Juror:

Indicated he was.

Defense Counsel:
"What type of officer?"

Juror:
"Jackson County deputy sheriff."

Defense Counsel:
"How long ago?"

Juror:
"Approximately six or seven years.

On appeal, it is urged by the appellant that the order or directive of the district court prohibiting disclosure or publication of the list of petit jurors until the opening day of the term, its refusal to allow inspection of the summons issued to petit jurors, its denial of a continuance in order to permit an investigation of the qualifications of those called for jury duty, and the restriction of the voir dire examination of prospective jurors, were, severally and collectively, discriminatory and a denial of due process of law.

Perhaps a benefit might inure to a defendant in a criminal case from an opportunity to investigate the background, environment, and other matters pertaining to those who have been summoned for jury duty. But a deprivation of whatever benefit that might result from a denial of such opportunity would, in the main, be offset by a voir dire examination of those called into the jury box The denial of access to the jury list to a defendant put to trial on the first day

of a term might deprive him of a slight advantage accruing to a defendant whose trial was set for some days later, but the first has no right to complain unless he has a right to enjoy the privilege accorded to the other. An inference may be drawn from the statutory requirement that a list of veniremen be furnished prior to trial in capital cases, 18 U.S.C.A. § 3432, that the Congress felt there was no necessity for such a provision in the trial of non-capital cases. It has been established in this Circuit that the trial court might, in its discretion, withhold the list of jurors until the day of the trial as was done in this case. *Wilson v. United States*, 5th Cir. 1939, 104 F. 2d 81, cert. den. 308 U. S. 574, 60 S. Ct. 89, 84 L. Ed. 481; *Spivey v. United States*, 5th Cir. 1940, 109 F. 2d 181, cert. den. 310 U. S. 631, 60 S. Ct. 1079, 84 L. Ed. 1401. Decisions of other circuits are referred to in *Hamer v. United States*, 9th Cir. 1958, 259 F. 2d 274, 279, cert. den. 359 U. S. 916, 79 S. Ct. 592, 3 L. Ed. 2d 577, reh. den. 359 U. S. 962, 79 S. Ct. 799, 3 L. Ed. 2d 769. See also *Wagner v. United States*, 9th Cir. 1959, 264 F. 2d 524.

The procedure to be followed in a voir dire examination of jurors in a criminal case is within the discretion of the trial court. Rule 24(a) Fed. Rules Crim. Proc. 18 U.S.C.A.; *Fox v. United States*, 5th Cir. 1961, 296 F. 2d 217.

In the case before us the trial judge was very liberal in permitting counsel to supplement the court's voir dire questioning, as is shown by the somewhat ex-

tended excerpt which has been transposed from the record to this opinion. The trial court did not permit the questioning of jurors with respect to propositions of law and its action was a proper one. We find no error in the record, and no abuse of discretion in the court's refusal to permit access to the jury list prior to the day of the trial, nor in the court's rulings on voir dire questions of appellant's counsel. Neither does the combining of the two disclose any error or abuse of discretion. The judgment of the district court is

AFFIRMED.

A true copy

Test:

EDWARD W. WADSWORTH,
Clerk, U. S. Court of Appeals,
Fifth Circuit.

(Seal) By CLARA R. JAMES,
Deputy.

New Orleans, Louisiana, Jan. 10, 1964.

**UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

**October Term, 1963.**

**No. 20270**

**D. C. Docket No. 1571 Criminal**

**LONNIE H. STONE,**
**Appellant,**

**versus**

**UNITED STATES OF AMERICA,**
**Appellee.**

**Appeal from the United States District Court for the Northern District of Florida.**

Before RIVES and JONES, Circuit Judges, and DAWKINS, JR., District Judge.

**JUDGMENT.**

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

November 13, 1963

Issued as Mandate:

Filed Dec. 17, 1963.

**IN THE**
**UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

**No. 20270**

**LONNIE H. STONE,**
**Appellant,**

**versus**

**UNITED STATES OF AMERICA,**
**Appellee.**

**Appeal from the United States District Court for the Northern District of Florida.**

(December 17, 1963.)

**ON PETITION FOR REHEARING.**

Before RIVES and JONES, Circuit Judges, and DAWKINS, JR., District Judge.

PER CURIAM: IT IS ORDERED That the petition for rehearing in the above entitled and numbered cause be, and it is, hereby DENIED.

**CERTIFICATE OF SERVICE.**

I hereby certify that copies of the foregoing Appendix have been furnished to Hon. Clinton N. Ashmore, U. S. Attorney, Federal Bldg. Tallahassee, Florida, and the Solicitor General, Dept. of Justice, Washington, D. C., by U. S. mail this .... day of January, 1964.

S. GUNTER TONEY,
212 E. Jefferson Street,
Tallahassee, Florida,
Attorney for Petitioner.

# In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 768

LONNIE H. STONE, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–9) is reported at 324 F. 2d 804.

### JURISDICTION

The judgment of the court of appeals was entered on November 13, 1963. A petition for rehearing was denied on December 17, 1963. The petition for a writ of certiorari was filed on January 16, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTION PRESENTED

Whether the district court abused its discretion when it declined to allow a departure from its standing rule



721-204—64

that the jury list could not be inspected prior to the first day of the trial term, where that was the day on which petitioner's trial was scheduled to commence.

## STATEMENT

In the United States District Court for the Northern District of Florida petitioner was tried by a jury and convicted on all three counts of an indictment charging unlawful possession of an unregistered still, and related offenses under the liquor laws (R. 3–4, 93, 97).[1] On counts 1 and 2 petitioner was sentenced to imprisonment for three years, and on count 3 he was given a suspended sentence and was ordered placed on probation for five years commencing with his release from imprisonment (R. 94–95, 101–102). The judgment was affirmed by the court of appeals (324 F. 2d 804).

The trial in this cause had been set for Monday, December 3, 1962, as the first case of the trial term (R. 18, 37). One week prior to the scheduled trial date, counsel for petitioner made a request of the deputy clerk of the district court to inspect the list of jurors (R. 18–19). The deputy clerk informed him that, although the jurors had been drawn and summoned, the requested inspection would have to be refused (R. 19) under a standing order of the court dated December 4, 1961, which read:

> Effective this date the names of jurors drawn for service on the grand jury or the petit jury in this District, or any division thereof, shall not be disclosed or published to any persons whatsoever in the absence of further order of this Court until the day of the beginning of service of such jurors

[1] Citation is to the "Printed Record" in the court of appeals which has been filed with the Court.

for the term for which they have been subpoenaed.

> This procedure has been followed for a long time in many other Districts. While I am confident that our old system has not been abused to any great extent, we have, nevertheless, had enough occasions where it was to suggest the need of such a restriction as this. Indeed, I am inclined to believe that this will eliminate the possibility of many situations which, if not actual violations of the obstruction of justice statutes, give rise to possible suspicion and subject prospective jurors to annoyance if not pressure.[2]

On Thursday, November 29, 1962, petitioner moved for leave to inspect the list of jurors within the next day, or, in the alternative, for a continuance of trial to a later date in the term (R. 18–19). After oral argument thereon, the motion was denied (R. 20–21). The court noted that petitioner established no detriment and that the order applied to the United States Attorney as well as to counsel for petitioner (R. 20).

At trial on December 3, 1962, petitioner stated that he was not ready to proceed for the reasons asserted in his prior motion[3] (R. 37). The court overruled petitioner's objection (R. 37–38). During the voir dire examination (R. 41–73), counsel for petitioner asked numerous questions of the prospective jurors and exercised three of his ten peremptory challenges (R. 60, 65, 67). He then announced: "The defendant accepts the

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[2] The text of the order does not appear in the printed record, but it is set out in the opinion of the court of appeals (Pet. App. 2).

[3] Petitioner later stated for the record that he had received a copy of the jury list at 8:25 a.m. that day (R. 79).

jury, Your Honor" (R. 73). The jury was sworn and trial proceeded (R. 73).

## ARGUMENT

There is no merit in petitioner's contention that the district court abused its discretion and deprived petitioner of due process of law when it denied him access to the jury list prior to the opening of the term, which was for him the day of trial. Congress has provided for furnishing a list of prospective jurors before trial only in treason and other capital cases. 18 U.S.C. 3432. This limited provision permits the inference that Congress felt no necessity for such a requirement in non-capital cases. *Hamer* v. *United States*, 259 F. 2d 274; 279 (C.A. 9), certiorari denied, 359 U.S. 916. In the absence of such a statutory requirement, the district court was empowered to make its own rules regarding the impaneling of jurors. See *Pointer* v. *United States*, 151 U.S. 396, 407–408; Rule 57(b), F.R. Crim. P. The fact that the drawing of the names must be public under 28 U.S.C. 1864 does not mean that the court may not make reasonable regulations as to the right to inspect the lists at a later time. *Wagner* v. *United States*, 264 F. 2d 524 (C.A. 9), certiorari denied, 360 U.S. 936.

Any regulation of court which fixes a time within which action may be taken will of necessity operate somewhat unequally depending on the scheduling of the calendar. The general order of the district court guarded against this possibility by providing that its limitations could be lifted in appropriate non-capital cases where a particular accused's pretrial need for the information outweighs the possibility that the prospec-

tive jurors might be subjected to extra-judicial pressure. In this case, however, the court decided, after hearing oral argument by counsel, that petitioner failed to demonstrate any possible detriment which would be occasioned by adherence to the standing order (R. 20). Petitioner shows no prejudice from that ruling. He was permitted to question the jurors during the voir dire examination, and he expressly announced acceptance of the jury.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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